

1 Charles S. LiMandri (CA Bar No. 110841)  
2 Paul M. Jonna (CA Bar No. 265389)  
3 Jeffrey M. Trissell (CA Bar No. 292480)  
4 B. Dean Wilson (CA Bar No. 305844)  
5 FREEDOM OF CONSCIENCE DEFENSE FUND  
P.O. Box 9520  
Rancho Santa Fe, CA 92067  
Tel: (858) 759-9948  
cslimandri@limandri.com

Thomas Brejcha, *pro hac vice*  
Peter Breen, *pro hac vice*  
THOMAS MORE SOCIETY  
309 W. Washington St., Ste. 1250  
Chicago, IL 60606  
Tel: (312) 782-1680  
[tbrejcha@thomasmoresociety.org](mailto:tbrejcha@thomasmoresociety.org)  
[pbreen@thomasmorsociety.org](mailto:pbreen@thomasmorsociety.org)

6 *Attorneys for Defendants David Daleiden and  
Gerardo Adrian Lopez*

Matthew F. Heffron, *pro hac vice*  
THOMAS MORE SOCIETY  
10506 Burt Circle, Suite 110  
501 Scoular Building  
Omaha, NE 68114  
Tel: (312) 782-1680  
mheffron@thomasmoresociety.org

*Attorneys for Defendant David Daleiden*

*[Counsel for Defendants Rhomberg, Newman, & Merritt and listed on Signature Page]*

16 | *Attorneys for Defendant David Daleiden*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

## INTRODUCTION

2 In its Order of July 16, 2019 [Dkt. 718], the Court ordered Defendants to file a supplemental  
3 brief explaining why late identification of each of the approximately 25 late-disclosed video  
4 segments is prejudicial to the defense. As Defendants explained in their Reply in Support of the  
5 Motion to Strike, the approximately 25 recordings at issue refer to 17 distinct conversations, or  
6 alleged “confidential communications,” for which Plaintiffs sought relief in this action. Of these,  
7 several have now become moot because of Plaintiffs’ admission in their papers that PPMM was not  
8 recorded (Dkt. 662 at 52, n.35; 66, n.50; and 79, n.59), and before this Court on July 17 that it is not  
9 asserting any claims from the 2013 ARHP Conference. One more (#32) has been identified as a  
10 mistaken duplication by Plaintiffs of an already-identified recording,

Of those that remain, Defendants are prejudiced for the following reasons:

12 1. #14–15, and 25–26: PPFA’s Doe1001 and Doe1003 recorded by Merritt during the 2015  
13 NAF tradeshow in Baltimore. The conversation took place *in a lobby area of the hotel*, not reserved  
14 for NAF’s exclusive use. This claim is particularly prejudicial to defendant Merritt, because prior  
15 to the amended disclosures, no recordings taken by her at NAF meetings had been identified as  
16 unlawful and as part of this lawsuit. Thus, she was not on notice throughout the depositions,  
17 including those of PPFA’s 30(b)(6) witness and of Doe 1003, that Plaintiffs intended to pursue their  
18 Fifth and Twelfth claims against her based directly on this recording at the 2015 NAF conference,  
19 as opposed to via alter ego and other theories of liability. Moreover, in the recording, Doe 1003  
20 states (at timestamp 26:30 – 45) that there is “always a concern and something that is foremost in  
21 people’s [i.e., attendees’] minds” that they might be secretly recorded while at NAF meetings,  
22 another topic she would have been questioned on in her deposition. No other recording of this  
23 conversation was at issue, so none of the other defendants questioned any witness about the  
24 circumstances or content of the conversation. Had Plaintiffs timely disclosed their intent to rely on  
25 these recording, Merritt and the other defendants would have thoroughly probed at depositions the  
26 alleged “confidential” nature of the conversations recorded.

27 2. #72: PPFA's Dr. Nucatola recorded by Merritt at the 2015 NAF tradeshow in Baltimore  
28 at approximately 12:10 p.m. As with the preceding recording, this claim is prejudicial to defendant

1 Merritt, as prior to the amended disclosures, no recordings taken by her at NAF meetings had been  
2 identified as unlawful and as part of this lawsuit. Thus, she was not on notice throughout the  
3 depositions, including those of PPFA's 30(b)(6) witness and of Dr. Nucatola, that Plaintiffs  
4 intended to pursue their Fifth and Twelfth claims against her based directly on this recording at the  
5 2015 NAF conference, as opposed to via alter ego and other theories of liability. No other recording  
6 of this conversation was at issue, so none of the other defendants questioned any witness about the  
7 circumstances or content of the conversation. Had Plaintiffs timely disclosed their intent to rely on  
8 this recording, Merritt and the other defendants would have thoroughly probed at depositions the  
9 alleged "confidential" nature of the conversation recorded.

10 3. #69 & 87 (duplicates): PPFA's Dr. Nucatola recorded (in the morning) by a stationary  
11 camera while conversing with Merritt and Baxter (non-party) at the 2014 NAF tradeshow in San  
12 Francisco. This claim is prejudicial because this is the first time that Plaintiffs identified this  
13 recording as being wrongful. Defendants were not able to question PPFA's 30(b)(6) witness as to  
14 which defendant(s) it contended were responsible for the recording, and why. Defendants also  
15 could not cross examine Plaintiffs' witnesses as to why this conversation was supposedly  
16 "confidential." This is particularly prejudicial as to Merritt, as Plaintiffs have not identified any  
17 (other) recordings by Merritt at the 2014 NAF meeting in San Francisco.

18 4. #19–21: These videos are of a panel presentation by Doe 1002 at the 2015 NAF meeting  
19 in Baltimore. This is the only recording claim that Plaintiffs are bringing based on a speech or  
20 presentation to an audience, as opposed to one-on-one conversations. Defendants would have  
21 questioned PPFA's 30(b)(6) witness about the circumstances of the recording and their contentions  
22 that Doe 1002 had an expectation of privacy in the communication.

23 5. #24: PPFA's Doe1003 recorded by Daleiden at the 2015 NAF tradeshow in Baltimore.  
24 This claim is prejudicial because this is the only recording of Doe 1003 at the 2015 NAF meeting  
25 Thus, Daleiden was not on notice to question Doe 1003 about her expectations of privacy in  
26 Maryland, and specifically her expectations of privacy at a NAF conference in light of her  
27 comments to Merritt, as detailed above.

28 6. #71: PPFA's Dr. Nucatola recorded by Daleiden at the 2015 NAF tradeshow in Baltimore

1 at approximately 1:30 p.m. This claim is prejudicial because this is the first time that Plaintiffs  
2 identified any recording of Dr. Nucatola in this jurisdiction and setting, as being wrongful. For this  
3 reason, and even more so because recordings #68 and 88, *infra*, had also not been identified,  
4 Daleiden was not on notice to question Dr. Nucatola about her expectations of privacy at a NAF  
5 conference.

6 7. #68 & 88 (duplicates): PPFA's Dr. Nucatola recorded (in the afternoon) by Daleiden at  
7 the 2014 NAF tradeshow in San Francisco. This claim is prejudicial because Daleiden was not on  
8 notice to question Dr. Nucatola in her deposition about whether or not she believed the  
9 conversation could be overheard by others (cf. PC §632) and her reasons for her belief. Further, as  
10 noted with the preceding recordings, prior to providing their additional responses on April 27,  
11 Plaintiffs had not identified any recordings of Dr. Nucatola at any NAF meeting, and so Daleiden  
12 was not on notice to question Dr. Nucatola about her expectations of privacy at any NAF  
13 conference.

14 8. #70: PPFA's Nucatola recorded by Bettisworth (non-party) at the 2015 NAF tradeshow  
15 in Baltimore at approximately 12:30 p.m. This claim is prejudicial because, although this is a  
16 conversation between Daleiden, Bettisworth, and Nucatola, Plaintiffs do not contend that Daleiden  
17 improperly recorded Dr. Nucatola, only that Bettisworth did. Again, because Plaintiffs had not  
18 previously identified any recordings of Dr. Nucatola at any NAF meeting, thus Defendants were  
19 not on notice to question her about her expectations of privacy at NAF gatherings.

20 In sum, prior to the amended disclosures, PPFA had identified only one alleged unlawful  
21 recording at either the 2014 or 2015 NAF meetings, a recording of Doe 1023, an administrative  
22 employee, at the BioMax exhibit table at the 2014 NAF meeting in San Francisco.<sup>1</sup> In their  
23 amended responses, PPFA added to their claims numerous other recordings taken at both NAF  
24 meetings, by various means, of various personnel, in various settings, from the exhibit hall, to the

25 <sup>1</sup> Unlike with other attendees, Plaintiffs did not produce any NAF Confidentiality Agreement signed by  
26 Doe 1023. Also, he was not listed as a witness on any of Plaintiffs' Rule 26 disclosures. He left PPFA's  
27 employ the same month that the recording took place. Mayo Dec. ISO Plaintiffs' Oppo. To Motions for  
Summary Judgment, Exh. 23, at 2. It appears that Plaintiffs' *inclusion* of Doe 1023 was more likely the  
product of inadvertence, than its exclusion of every other recording of PPFA personnel at the two NAF  
meetings.

1 lobby, to formal presentations. These recordings bear on PPFA's claims not just under the  
2 recording statutes, but also for breach of the NAF agreements. In light of Plaintiffs' contentions  
3 concerning how the particular conditions (contractual and otherwise) of NAF meetings bear on  
4 expectations of privacy and confidentiality, Defendants were prejudiced in not being on notice to  
5 question Dr. Nucatola, Doe 1003, and PPFA's 30(b)(6) witness about the circumstances of these  
6 recordings. Moreover, they were not on notice to question these witnesses about PPFA's standing  
7 to bring these claims on the basis of recordings of Dr. Nucatola and Doe 1003 at non-PPFA  
8 conferences.

9 Additionally:

10 9. #3: PPGC's Doe9002 recorded by Daleiden at PPGC's offices in Houston. This claim is  
11 prejudicial because it adds Doe9002. Plaintiffs previously identified other portions of the recording  
12 with respect to other individuals (#7, 40, 57), but failed to previously identify Doe9002 with respect  
13 to it. Assuming only one "person" (PPGC) is seeking relief based on the PPGC site visit  
14 recordings, Defendants concede that there is no prejudice from this late disclosure. However,  
15 should PPGC take the position that it is entitled to recover statutory damages for each person  
16 recorded, then Defendants are prejudiced by not being given the opportunity to question PPGC's  
17 30(b)(6) witness about its standing to bring a claim for Doe 9002, who was neither a PPGC nor a  
18 PPCFC employee, as well as about the confidential nature of a 10-second communication in which  
19 all Doe 9002 said was "OK" when being introduced to the Biomax representatives.

20 10. #27-28: PPFA's Doe1003 recorded by Daleiden at the PPFA National Conference in  
21 Washington. This claim is prejudicial because this is the first time that Plaintiffs identified these  
22 recordings, or any of recordings of Doe 1003 in this jurisdiction and setting, as being wrongful.  
23 Thus, Daleiden was not on notice to question Doe 1003 at her deposition about her expectations of  
24 privacy at a PPFA conference in the District of Columbia, a one-party consent jurisdiction.

## 25 C O N C L U S I O N

26 For the foregoing reasons, Defendants request that the Court grant their motion to strike  
27 the above-cited entries in Exhibit 33 to the Trissell declaration, precluding Plaintiffs from asserting  
28 that those recordings were taken illegally or tortiously.



1                   Matthew F. Heffron, *pro hac vice*  
2                   THOMAS MORE SOCIETY  
3                   10506 Burt Circle, Suite 110  
4                   501 Scoular Building  
5                   Omaha, NE 68114  
6                   Tel: (312) 782-1680  
7                   mheffron@thomasmoresociety.org

8                   *Attorneys for Defendant David Daleiden*

9                   /s/ Edward L. White  
10                  Edward L. White III, *pro hac vice*  
11                  Erik M. Zimmerman, *pro hac vice*  
12                  John A. Monaghan, *pro hac vice*  
13                  AMERICAN CENTER FOR LAW & JUSTICE  
14                  3001 Plymouth Rd., Ste. 203  
15                  Ann Arbor, MI 48105  
16                  Tel: (734) 680-8007; Fax: (734) 680-8006  
17                  ewhite@aclj.org  
18                  ezimmerman@aclj.org  
19                  jmonaghan@aclj.org

20                  Vladimir F. Kozina; SBN 95422  
21                  MAYALL HURLEY, P.C.  
22                  2453 Grand Canal Blvd.  
23                  Stockton, CA 95207  
24                  Tel: (209) 477-3833; Fax: (209) 473-4818  
25                  VKozina@mayallaw.com

26                  *Attorneys for Defendant Troy Newman*

27                  /s/ Catherine Short  
28                  Catherine W. Short (CA Bar No. 117442)  
29                  LIFE LEGAL DEFENSE FOUNDATION  
30                  Post Office Box 1313  
31                  Ojai, CA 93024-1313  
32                  Tel: (707) 337-6880  
33                  LLDFOjai@earthlink.net

34                  Michael Millen (CA Bar No. 151731)  
35                  ATTORNEY AT LAW  
36                  119 Calle Marguerita Ste. 100  
37                  Los Gatos, CA 95032  
38                  Tel: (408) 871-0777  
39                  Facsimile: (408) 866-7480  
40                  mikemillen@aol.com

41                  *Attorneys for Defendant Albin Rhomberg*

/s/ Horatio G. Mihet  
Horatio G. Mihet\*  
Liberty Counsel  
hmihet@lc.org  
P.O. Box 540774  
Orlando, FL 32854  
(407) 875-1776  
\*Admitted pro hac vice

Nicolaie Cocos CA Bar # 204703  
Law Office of Nic Cocos and Associates  
nic@cocislaw.com  
38975 Sky Canyon Dr., Suite 211  
Murrieta, CA 92563  
(951) 695-1400

*Attorneys for Defendant Sandra Susan Merritt*

**Attestation Pursuant to Civ. L.R. 5.1(i)(3)**

As the filer of this document, I attest that concurrence in the filing was obtained from the other signatories.

/s/ Charles S. LiMandri  
Charles S. LiMandri  
*Counsel for CMP, BioMax, Lopez & Daleiden*

**CERTIFICATE OF SERVICE**

*Planned Parenthood, et al. v. The Center for Medical Progress, et al.*  
Case No.: 3:16-cv-00236

I, Kathy Denworth, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; my business address is P.O. Box 9520, Rancho Santa Fe, California 92067, and that I served the following document(s):

- Supplemental Reply in Support of Motion to Strike in Support of Various Motions for Summary Judgment.

on the interested parties in this action by emailing a true copy addressed as follows:

### *Via regular mail and email*

Diane Sterk  
Arnold & Porter LLP  
Three Embarcadero Center, 7th Floor  
San Francisco, CA 94111-4024  
415-434-1600; 415-677-6262 (fax)  
[amy.bomse@aporter.com](mailto:amy.bomse@aporter.com)

[amy.bonse@aporter.com](mailto:amy.bonse@aporter.com)  
Attorneys for Plaintiffs Planned  
Parenthood Federation of America, Inc., et  
al.

Amy. L. Bomse  
Rogers Joseph O'Donnell  
311 California St., Fl. 10,  
San Francisco, CA 94104  
415/956-2828  
ABomse@rjo.com

Attorneys for Plaintiffs Planned Parenthood Federation of America, Inc., et al.

Catherine Wynne Short  
Life Legal Defense Foundation  
Post Office Box 1313  
Ojai, CA 93024-1313  
805-640-1940  
[lldfojai@cs.com](mailto:lldfojai@cs.com)

[info@ajc.com](mailto:info@ajc.com) Attorneys for Defendant Albin Rhomberg

Peter Christopher Breen  
Thomas Leonard Brejcha, Jr.  
Thomas More Society  
19 S. LaSalle Street, Suite 603  
Chicago, IL 60603  
312-782-1680  
[pbreen@thomasmoresociety.org](mailto:pbreen@thomasmoresociety.org)

[tbrejcha@thomasmoresociety.org](mailto:tbrejcha@thomasmoresociety.org)  
**Attorneys for Defendant David**

Michael Millen  
Law Offices of Michael Millen  
119 Calle Marguerita, Ste. 100  
Los Gatos, CA 95032  
408-866-7480; Fax: 408-516-9861  
[MikeMillen@aol.com](mailto:MikeMillen@aol.com)  
**Attorneys for Defendant Albin Rhomberg**

Vladimir Frank Kozina  
Mayall Hurley, P.C.  
2453 Grand Canal Boulevard  
Stockton, CA 95207  
209-477-3833; 209-473-4818 (fax)  
[vkozina@mayallaw.com](mailto:vkozina@mayallaw.com)

## **Attorneys for Defendant Troy Newman**

Helene Krasnoff  
Planned Parenthood Federation of America  
1110 Vermont Ave NW, Suite 300  
Washington, DC 20005  
202-973-4800  
[helene\\_krasnoff@ppfa.org](mailto:helene_krasnoff@ppfa.org)

[helene.krashoff@ppla.org](mailto:helene.krashoff@ppla.org)  
**Attorneys for Plaintiff Planned Parenthood Federation of America, Inc.**

Edward L. White III  
Erik M. Zimmerman  
AMERICAN CENTER FOR LAW &  
JUSTICE  
3001 Plymouth Rd., Ste. 203  
Ann Arbor, MI 48105  
734-680-8007; 734-680-8006 (fax)  
[ezimmerman@aclj.org](mailto:ezimmerman@aclj.org)  
Attorneys for Defendant Troy Newman

Matt Heffron, pro hac vice  
BROWN & BROWN, LLC  
501 Scoular Building  
2027 Dodge Street  
Omaha, NE 68102  
402-346-5010; 402-345-8853 (fax)  
[mheffron@bblaw.us](mailto:mheffron@bblaw.us)  
**Attorneys for Defendant David Daleiden**

Horatio Gabriel Mihet  
Liberty Counsel  
P.O. Box 540774  
Orlando, FL 32854  
407-875-1776; 407-875-0770 (fax)  
[hmihet@lc.org](mailto:hmihet@lc.org); [jchristman@lc.org](mailto:jchristman@lc.org)  
**Attorneys for Defendant Sandra Susan Merritt**

Nicolaie Cocis  
Law Office of Nic Cocis & Associates  
38975 Sky Canyon Drive, Suite 211  
Murrieta, CA 92563  
951-695-1400; 951-698-5192 (fax)  
[nic@cocislaw.com](mailto:nic@cocislaw.com)

Atorneys for Defendant Sandra Susan Merritt

X **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Rancho Santa Fe, California in the ordinary course of business. The envelope was sealed and placed for collection and mailing on this date following our ordinary practices. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

"" (BY ELECTRONIC MAIL) I served a true copy, electronically on designated recipients via electronic transmission of said documents.

Z" **(BY ELECTRONIC FILING/SERVICE)** I caused such document(s) to be Electronically Filed and/or Service using the ECF/CM System for filing and transmittal of the above documents to the above-referenced ECF/CM registrants.

I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct.

Executed on July 24, 2019, at Rancho Santa Fe, California.

Kathy Denworth  
Kathy Denworth